Nos. 79-1890 and 79-1904

IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

STATE OF ALASKA, ET AL.

KENAI PENINSULA BOROUGH, PETITIONER

v.

STATE OF ALASKA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL PETITIONERS

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We confine this reply to two points raised for the first time in this Court.

1. Only the briefest response is appropriate to Alaska's new suggestion that the term "minerals," added to the Wildlife Refuge Revenue Sharing Act in 1964, does not embrace oil and gas (Resp. Br. 12-14). The point was expressly discussed, and resolved in the affirmative, by the 1975 opinions of the Solicitor of the Department of the Interior (Pet. App. 30a-33a)[1] and of the Comptroller General (Pet. App. 38a-39a). At no time, until now, did the State dispute this conclusion.

On the contrary, in its representations to the Comptroller General (J.A. 94-103, 116-119), Alaska was advancing a wholly different argument: that "by adding the term 'mineral' Congress intended to confirm the existing practice of distributing oil and gas revenues from wildlife refuges created from acquired lands pursuant to Section 715s," but not to alter the distribution scheme for mineral receipts from public land refuges (J.A. 97-98; see also J.A. 118). The State maintained that stance in the district court and the court of appeals. Thus, in its Memorandum in Support of its Motion for Partial Summary Judgment (R. 161 ff), Alaska argued that the "addition of the term 'minerals' in the list of enumerated products was intended to do no more than confirm distribution of oil and gas revenues under the Mineral Leasing Act for Acquired Lands" (R. 173). So, also, in a subsequent Response and Reply filed in the district court (R. 961 ff), Alaska insisted that "the state's position is not that the word 'minerals' be ignored, but rather that the statute be

[1] Our references are to the Petition in No. 79-1890.

construed to apply the word 'minerals' to acquired lands in wildlife refuges but not wildlife refuges created from reserved public domain" (R. 962). And, in its appellate Brief,[2] Alaska itself repeatedly referred to oil and gas leasing receipts as "mineral revenues" (*e.g.*, *id.* at 1, 2, 3, 8, 9, 13, 16, 18), and ultimately endorsed the district court ruling, described as holding "that Congress intended the word 'minerals' in the 1964 amendment to 16 U.S.C. § 715s to include only 'certain minerals'—i.e., minerals on acquired lands in the National Wildlife Refuge System" (*id.* at 26).

It is not surprising, therefore, that both the district court (Pet. App. 19a-25a) and the court of appeals (Pet. App. 7a-11a) accepted without question the premise that "revenues * * * from the sale or other disposition of * * * minerals" in the amended Wildlife Refuge Revenue Sharing Act included oil and gas lease receipts—albeit they went on to hold that only such revenues from acquired land refuges were reached. Without questioning the State's right to defend those decisions on alternative grounds, we may perhaps comment that it is very late in the day to be urging a new "ambiguity" that went unnoticed during five years of litigation.

As is usually the case with such last-minute arguments, the point is without substance. Alaska's present suggestion is that "minerals" in the Wildlife Act does not include oil and gas and that references to oil and gas leasing revenues in the legislative history of the 1964 amendment merely recognize the preexisting distribution scheme mandated for acquired land refuges by the Mineral Leasing Act for Ac-

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[2] We have lodged with the Clerk a copy of Alaska's Brief in the court of appeals.

quired Lands of 1947. Resp. Br. 12-13, 15, 19. But the older statute also governed leasing for coal, phosphate, oil shale, sodium, potassium and sulphur. 30 U.S.C. 352. Is it argued that these undoubted "minerals" are also not encompassed by the 1964 amendment? That would render the addition of the word "minerals" to the Refuge Act wholly meaningless. Or, rather, is it conceded that "hard" minerals covered by the Acquired Lands Leasing Act are included, but not oil and gas? That would make the addition of "minerals" in 1964 a very imperfect "perfecting" amendment—still compelling the reader of the Refuge Act to look elsewhere to know how oil and gas revenues from acquired land refuges are to be distributed.

The answer is obvious. At the least—as Alaska itself has previously always maintained—the 1964 amendment to the Refuge Act means to embrace all "minerals" specified in the Acquired Lands Leasing Act, including oil and gas. The only debatable point is whether—as the text plainly says—those minerals are subjected to the Refuge Act distribution scheme even when the lease covers public land reserved for wildlife purposes. We do not here repeat our submission on that question.

2. No less novel is Alaska's present contention that the Kenai Moose Range and other "Alaska wildlife areas" are uniquely exempted from the distribution formula of the Wildlife Refuge Revenue Sharing Act (Resp. Br. 17-19). At no previous stage of the proceedings, including the State's submissions to the Comptroller General, was this suggestion remotely advanced. All parties have submitted the case, and each tribunal has considered it, on the basis that Alaskan refuges were indistinguishable for relevant

purposes from all other wildlife refuges made up of reserved public lands.[3] At all events, the point is wholly without merit.

As amended in 1964, the Wildlife Refuge Revenue Sharing Act applies to "those areas of the National Wildlife Refuge System, National Fish Hatcheries, or other areas, that are solely or primarily administered by [the Secretary of the Interior] through the United States Fish and Wildlife Service." 16 U.S.C. (Supp. II) 715s(a).[4] Significantly, even now, Alaska does not dispute that the Kenai Range fits within this definition. Nor could any such argument be advanced.

It is conceded that the Range is among the "Alaska wildlife areas" identified in the Secretary's mineral leasing regulation (Resp. Br. 18 n.25), which are there expressly described as "administered by the United States Fish and Wildlife Service." 43 C.F.R. 192.9(a)(4) (1959); 43 C.F.R. 3101.3-3(b). De-

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[3] Except only as the State has invoked the Alaska Statehood Act and the Alaska Native Claims Settlement Act as obstacles to applying the Refuge Act there.

[4] The "National Wildlife System" is further defined as including "lands and waters administered by the Secretary as wildlife refuges, * * * wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas established under any law, proclamation, Executive, or public land order." *Ibid.* And "reserve area" is later defined as meaning "any area of land withdrawn from the public domain and administered, either solely or primarily, by the Secretary through the [United States Fish and Wildlife] Service." 16 U.S.C. (Supp. II) 715s(g)(3).

This, in effect, is the same coverage as the original 1935 Act, 49 Stat. 383, which applied to specified revenues from "refuges * * * administered by the Bureau of Biological Survey of the United States Department of Agriculture," the predecessor of the Fish and Wildlife Service. See our opening Brief at 25.

spite its name, the Kenai Range is not classified as a "game range," under "the joint jurisdiction of the Bureau of Land Management and the United States Wildlife Service." The reason is simply that it was not "reserved for [the] dual purposes" specified in the regulations. *Ibid.* See Exec. Order No. 8979, 6 Fed. Reg. 6471 (1941). See also *Udall* v. *Tallman*, 380 U.S. 1, 5-16 (1965).[5]

That ought to be the end of the matter. So far as distribution of non-mineral revenues is concerned, the Kenai Moose Range has at all times been within the scope of the Wildlife Revenue Sharing Act.[6] If, as we have argued, that Act, at least since 1964, reaches mineral receipts from public land refuges generally, there is no ground for exempting the Kenai Range, equally administered by the Fish and Wildlife Service. The Secretary's letters cited by the State (Resp. Br. 17-18) do not suggest otherwise: They speak of

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[5] In *Tallman*, this Court fully reviewed the history of the Kenai Moose Range, as well as the sequence of mineral leasing regulations applicable generally to wildlife refuges. The Court's opinion recites, *inter alia*, the agreement reached in 1956 between the Department of the Interior and the House Committee on Merchant Marine and Fisheries with respect to the submission of any mineral leasing proposal, or other "alienation or relinquishment of any interest," affecting lands "under [the] jurisdiction" of the Fish and Wildlife Service, and the Committee's approval, "[p]ursuant to [that] agreement," of a Wildlife Service proposal for some 30 oil and gas leases on the Kenai Range. 380 U.S. at 10-12. It is thus clear that, at least since 1956, the Kenai refuge was recognized by all concerned as under the administration of the Service.

[6] Thus, the very Department of the Interior charts invoked by Alaska (Resp. Br. 19-20) indicate that non-mineral receipts from the Kenai Range were distributed under the Wildlife Refuge Revenue Sharing Act.

"jointly administered" "game ranges," not "Alaska wildlife areas." The attempt to confuse the two categories, carefully distinguished in published regulations since 1958,[7] is disingenuous.

It is wholly irrelevant that, in some respects, the mineral leasing rules for "game ranges" and "Alaska wildlife areas" are the same. And it is equally beside the point that such leases are issued through the Bureau of Land Management. That is true *in every case* where wildlife refuge lands are leased. 43 C.F.R. 192.9(b) (1959); 50 C.F.R. 29.31 (1961); 43 C.F.R. 3101.3-3(a)(1); 50 C.F.R. 29.31. For purposes of the Wildlife Revenue Sharing Act, the refuge remains "solely or primarily administered" by the Fish and Wildlife Service. See 43 C.F.R. 192.9(a)(1) (1959); 43 C.F.R. 3101.3-3(a). If it were otherwise, no mineral revenues, even from acquired land refuges, would ever be distributed to countries. And that, even Alaska does not suggest. See Resp. Br. 19, 21.

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[7] In fact, the distinction is older. At least as early as 1956, the Secretary of the Interior had informed Congress that the Wildlife Refuge System included some 7,280,596 acres of public lands in Alaska (obviously including the Kenai Range) "withdrawn for sole administration by the Fish and Wildlife Service," as contrasted with some 4,615,774 acres elsewhere "withdrawn for joint administration by the Fish and Wildlife Service and some other agency * * *, most frequently * * * stock grazing under the Bureau of Land Management." Letter from the Acting Secretary of the Interior to the Chairman of the House Committee on Merchant Marine and Fisheries (Feb. 23, 1956), in *Wildlife Refuge Disposal Policy: Hearings on H.R. 5306, H.R. 6723 and H.R. 8839 Before the House Comm. on Merchant Marine and Fisheries*, 84th Cong., 2d Sess. 268-269 (1956).

For the reasons stated here and in our opening brief, the judgment below should be reversed.

Respectfully submitted.

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